

**UNITED STATES BANKRUPTCY COURT**  
Eastern District of California

**Honorable Ronald H. Sargis**  
**Chief Bankruptcy Judge**  
**Sacramento, California**

**October 28, 2021 at 10:30 a.m.**

---

|           |   |   |  |
|-----------|---|---|--|
| <b>1.</b> | <b><u>17-26125</u>-E-7</b><br><b><u>HSM</u>-21</b><br><br><b>Items 1 thru 2</b> | <b>FIRST CAPITAL RETAIL,</b><br><b>LLC</b><br><b>Gabriel Liberman</b> | <b>MOTION FOR COMPENSATION BY</b><br><b>THE LAW OFFICE OF HEFNER,</b><br><b>STARK &amp; MAROIS, LLP FOR</b><br><b>HOWARD S. NEVINS, TRUSTEES</b><br><b>ATTORNEY(S)</b><br><b>9-29-21 [660]</b> |
|-----------|---|---|--|

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**

-----

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 29, 2021. By the court's calculation, 29 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00).

The Motion for Allowance of Professional Fees was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, -----.

|  |
|--|
| <b>The Motion for Allowance of Professional Fees is granted.</b> |
|--|

Howard S. Nevin, the Attorney(“Applicant”) for Kimberly J. Husted, the Chapter 7 (“Client”), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period September 6, 2018, through October 28, 2021. The order of the court approving employment of Applicant was entered on September 20, 2018. Dckt. 500. Applicant requests fees in the amount of \$190,688.70 and costs in the amount of \$2,764.80.

## **APPLICABLE LAW**

### **Reasonable Fees**

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney’s services, the manner in which services were performed, and the results of the services, by asking:

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

*In re Garcia*, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

### **Lodestar Analysis**

For bankruptcy cases in the Ninth Circuit, “the primary method” to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves “multiplying the number of hours reasonably expended by a reasonable hourly rate.” *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate, however. *See id.* (citing *Unsecured Creditors’ Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

### **Reasonable Billing Judgment**

Even if the court finds that the services billed by an attorney are “actual,” meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court’s authorization to employ an attorney to work in a bankruptcy case does not give that attorney “free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery,” as opposed to a possible recovery. *Id.*; see also *Brosio v. Deutsche Bank Nat’l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) (“Billing judgment is mandatory.”). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

- (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
- (b) To what extent will the estate suffer if the services are not rendered?
- (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

*In re Puget Sound Plywood*, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant’s services for the Estate include general case administration, asset investigation, asset disposition, and claims.

This bankruptcy case was filed in 2017, and the order authorizing the employment of counsel for the Chapter 7 Trustee after conversion was entered on September 20, 2021. In addition to this Bankruptcy Case, there are eight related adversary proceedings prosecuted by the Chapter 7 Trustee.

Though substantial work was done by counsel and other professionals, this has been a Chapter 11 case in which the administrative expenses of all exceed the unencumbered monies of the bankruptcy estate.

The Estate has \$62,000.00 of unencumbered monies to be administered as of the filing of the Application. While counsel’s attorney’s fees number appears large, it will be paid on a pro rata basis with other professionals and the Trustee.

## **FEES AND COSTS & EXPENSES REQUESTED**

### **Fees**

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

General Case Administration: Applicant spent 62.30 hours in this category but is waiving 6.45 hours of billing charges. The total hours billed is 55.85 hours. Applicant provided customary services such as review of the case, communicated with Trustee and Debtor’s counsel, and analyzed

issues in regards to the conversion of the case.

Litigation: Applicant spent 390.30 hours in this category but is waiving 17.54 hours of billing charges. Total hours billed is 372.76 hours. Applicant analyzed documents for interpleader action, investigated pending state court litigation, and monitored and provided input as appropriate for RICO claims.

Asset Investigation: Applicant spent 23.90 hours in this category but is waiving 0.10 hours of billing. Total hours billed is 23.80 hours. Applicant communicated with trustee and Debtor about assets turned over and attended 341 meeting.

Asset Disposition: Applicant spent 33.70 hours in this category but it is waiving 4.20 hours of billing. Total hours billed is 29.50 hours. Applicant drafted motions, engaged in settlement talks for interpleader action, drafted settlement agreement and monitored agreement performance.

Claims: Applicant spent 3.80 hours in this category. Applicant reviewed and analyzed proof of claims.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

| <b>Names of Professionals and Experience</b> | <b>Time</b> | <b>Hourly Rate</b> | <b>Total Fees Computed Based on Time and Hourly Rate</b> |
|--|-------------|--------------------|--|
| Howard S. Nevin, Attorney                    | 211.2       | \$370.99           | \$78,353.09  |
| Aaron A. Avery, Attorney                     | 302.8       | \$370.99           | \$112,335.77   |
|  | 0           | \$0.00             | \$0.00   |
|  | 0           | \$0.00             | \$0.00   |
|  | 0           | \$0.00             | \$0.00   |
|  | 0           | \$0.00             | \$0.00   |
|  | 0           | \$0.00             | <u>\$0.00</u>  |
| <b>Total Fees for Period of Application</b>  |             |                    | \$190,688.86   |

### **Costs & Expenses**

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$2,764.80 pursuant to this application. Although total costs requested are \$2,997.25, Applicant is waiving \$232.45 in CourtCall fees.

The costs requested in this Application are:

| <b>Description of Cost</b>                  | <b>Per Item Cost,<br/>If Applicable</b> | <b>Cost</b>       |
|---|---|-------------------|
| Photocopies                                 | \$0.10                                  | \$1,014.80        |
| Advances                                    |   | \$1,982.45        |
|   |   | \$0.00            |
|   |   | \$0.00            |
| <b>Total Costs Requested in Application</b> |   | <b>\$2,997.25</b> |

## **FEES AND COSTS & EXPENSES ALLOWED**

### **Fees**

#### **Hourly Fees**

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$190,688.70 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

### **Costs & Expenses**

First and Final Costs in the amount of \$2,764.80 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

The court authorizes the Chapter 7 Trustee to pay 100% of the fees and 100% of the costs allowed by the court.

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

|                    |              |
|--------------------|--------------|
| Fees               | \$190,688.70 |
| Costs and Expenses | \$2,764.80   |

pursuant to this Application as final fees and costs pursuant to 11 U.S.C. § 330 in this case.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Allowance of Fees and Expenses filed by Howard S. Nevins, of Hefner Law, (“Applicant”), Attorney for Kimberly J. Husted, the

Chapter 7 Trustee, (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Applicant is allowed the following fees and expenses as a professional of the Estate:

Applicant, employed by the Chapter 7 Trustee

Fees in the amount of \$190,688.70

Expenses in the amount of \$2,764.80,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee

**IT IS FURTHER ORDERED** that the Chapter 7 Trustee is authorized to pay 100% of the fees and 100% of the costs allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**

-----

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 29, 2021. By the court's calculation, 29 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00).

The Motion for Allowance of Professional Fees was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, -----.

**The Motion for Allowance of Professional Fees is granted.**

Gabrielson & Company, the Accountant("Applicant") for Kimberly J. Husted, the Chapter 7 ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period October 25, 2018, through September 20, 2021. The order of the court approving employment of Applicant was entered on November 5, 2018. Dckt. 509. Applicant requests fees in the amount of \$6,701.50 and costs in the amount of \$36.45.

## **APPLICABLE LAW**

### **Reasonable Fees**

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the professional's services, the manner in which services were performed, and the results of the services, by asking:

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the professional exercise reasonable billing judgment?

*In re Garcia*, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

### **Lodestar Analysis**

For bankruptcy cases in the Ninth Circuit, “the primary method” to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves “multiplying the number of hours reasonably expended by a reasonable hourly rate.” *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate, however. *See id.* (citing *Unsecured Creditors’ Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

### **Reasonable Billing Judgment**

Even if the court finds that the services billed by a professional are “actual,” meaning that the fee application reflects time entries properly charged for services, the professional must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. A professional must exercise good billing judgment with regard to the services provided because the court’s authorization to employ a professional to work in a bankruptcy case does not give that professional “free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery,” as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat’l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) (“Billing judgment is mandatory.”). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

- (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
- (b) To what extent will the estate suffer if the services are not rendered?



(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

*In re Puget Sound Plywood*, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include accounting and tax services provided to the Estate. The court finds the services were beneficial to Client and the Estate and were reasonable.

## **FEES AND COSTS & EXPENSES REQUESTED**

### **Fees**

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

Reviewed Debtor Historical Financial Records and Consultation with Trustee: Applicant spent 7.0 hours in this category. Applicant reviewed numerous final and legal documents and listened to 341 hearing recordings.

Preparation of Income Tax Returns: Applicant spent 8.4 hours in this category. Applicant prepared 2018 and 2019 Debtor LLC income tax returns and related Cloobek motions for payment of minimum taxes and communicated with Franchise Tax Board.

Administrative Functions: Applicant spent 1.9 hours in this category. Applicant prepared accountant declaration and related employment documents.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

| <b>Names of Professionals and Experience</b> | <b>Time</b> | <b>Hourly Rate</b> | <b>Total Fees Computed Based on Time and Hourly Rate</b> |
|--|-------------|--------------------|--|
| Michael Gabrielson, Principal (2018)         | 7.7         | \$375.00           | \$2,887.50   |
| Michael Gabrielson, Principal (2019)         | 3.1         | \$395.00           | \$1,224.50   |
| Michael Gabrielson, Principal (2020)         | 4.3         | \$395.00           | \$1,698.50   |
| Michael Gabrielson, Principal (2021)         | 2.2         | \$405.00           | \$891.00   |
|  | 0           | \$0.00             | \$0.00   |

|   |   |        |               |
|---|---|--------|---------------|
|   | 0 | \$0.00 | \$0.00        |
|   | 0 | \$0.00 | <u>\$0.00</u> |
| <b>Total Fees for Period of Application</b> |   |        | \$6,701.50    |

### **Costs & Expenses**

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$36.45 pursuant to this application.

The costs requested in this Application are,

| <b>Description of Cost</b>                  | <b>Per Item Cost, If Applicable</b> | <b>Cost</b> |
|---|-------------------------------------|-------------|
| Copying (221 pages)                         | \$0.10/page                         | \$22.10     |
| Postage                                     |                                     | \$14.35     |
|   |                                     | \$0.00      |
|   |                                     | \$0.00      |
| <b>Total Costs Requested in Application</b> |                                     | \$36.45     |

### **FEES AND COSTS & EXPENSES ALLOWED**

#### **Fees**

##### **Hourly Fees**

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$6,701.50 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

#### **Costs & Expenses**

First and Final Costs in the amount of \$36.45 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

The court authorizes the Chapter 7 Trustee to pay 100% of the fees and 100% of the costs allowed by the court.

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

|                    |            |
|--------------------|------------|
| Fees               | \$6,701.50 |
| Costs and Expenses | \$36.45    |

pursuant to this Application as final fees and costs pursuant to 11 U.S.C. § 330 in this case.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Allowance of Fees and Expenses filed by Gabrielson & Company (“Applicant”), Accountant for Kimberly J. Husted, the Chapter 7 Trustee, (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Gabrielson & Company is allowed the following fees and expenses as a professional of the Estate:

Gabrielson & Company, Professional employed by the Chapter 7 Trustee

Fees in the amount of \$6,701.50  
Expenses in the amount of \$36.45,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

**IT IS FURTHER ORDERED** that the Chapter 7 Trustee is authorized to pay 100% of the fees and 100% of the costs allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

-----

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on September 22, 2021. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

**The Hearing on the Motion to Avoid Judicial Lien is continued to December 9, 2021 at 10:30 am. Movant to provide a copy of the Abstract of Judgment which clearly identifies the judgment to which it relates to the court by November 15, 2021.**

This Motion requests an order avoiding the judicial lien of Investment Retrievers, Inc. ("Creditor") against property of the debtor, Philip Joseph Ouellette ("Debtor") commonly known as 3123 Erle Road, Marysville, California ("Property").

The Motion states a judgment was entered against Debtor in favor of Creditor from a lawsuit in the Superior Court of California captioned INVESTMENT RETRIEVERS, INC., vs. Philip Joseph Ouellette, Case No. CVCV18-01827. Motion at ¶ 1, Dckt. 34. In addition, the Motion states an Abstract of Judgment was filed with Yuba County Recorder's Office on August 13, 2019 and recorded on December 30, 2020. *Id.* The recorders document number is DOC-2020-022127. *Id.*; Dckt. 37.

Although Movant has provided the court with an Exhibit of the Abstract of Judgment's cover page, Movant has failed to provide the court with a copy of the complete Abstract of Judgment. Instead, Movant has provided the court with an exhibit for the Memorandum of Costs After Judgment which establishes a judgment principal remaining due of \$87,863.49. Exhibit A, Dckt. 37. This document is not sufficient to act in place of a copy of the Abstract of Judgment. Absent a copy of the complete Abstract of Judgment, the court is not provided proper information as to what the judgment is nor

against whom the judgment has been obtained.

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of \$276,266.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total \$107,211.07 as of the commencement of this case are stated on Debtor's Schedule D. Dckt. 1. Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of \$300,000.00 on Amended Schedule C. Dckt. 24.

The court needs clear evidence prior to granting a motion that impairs one's property rights. Evidence of the complete Abstract of Judgment must be provided. Once provided, the court can apply the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A) to determine whether Debtor is entitled to void the lien.

An order substantially in the following form shall be prepared and issued by the court:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Philip Joseph Ouellette ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Hearing on the Motion to Avoid Judicial Lien is continued to **December 9, 2021 at 10:30 a.m.** Movant to provide a copy of the Abstract of Judgment to the court by November 15, 2021.

**Items 4 thru 6**

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

-----

The Order to Show Cause was served by the Clerk of the Court on Debtor (*pro se*) and Chapter 13 Trustee as stated on the Certificate of Service on October 2, 2021. The court computes that 26 days' notice has been provided.

The Order to Show Cause was issued due to Debtor's failure to file the following documents in this case: Social Security Number.

**The Order to Show Cause is discharged, XXXXX.**

On September 23, 2021, the court conducted a hearing on Chapter 7 Trustee's Motion to Dismiss this case due to Debtor's failure to appear at the First Meeting of Creditors. Debtor filed a Response, stating reasons for her inability to appear.

In reviewing the file, a fundamental impediment to Debtor prosecuting this case was identified – Debtor's inability to provide documentation of her Social Security Number. Debtor argued that she has obtained copies of her Social Security Card in the past, but now obtaining another Card was not possible. She stated that she has attempted to do so at various Social Security Offices, but they are closed. She also investigated using private, for profit, services, but that was not successful.

Though much argument and accusations were hurled at the hearing, and most of the discussion was non-productive, there was an idea that germinated. In addition to Debtor continuing to try and obtain documentation of her Social Security Number, the court has four prior bankruptcy cases filed by Debtor in which documentation of her Social Security Number would have to have been provided. The court's records show Debtor's four prior cases having been filed in 2019, 2014, 2013, and 2010.

**Documentation of Social Security Number  
In the Court's Record For A Prior Case.**

The 2019, 2014, and 2013 cases were each dismissed before the First Meetings of Creditors were conducted, resulting in there being no documentation that the bankruptcy trustee had received documenting the Debtor's Social Security Number. However, in the 2010 case filed by Debtor, 10-41847, the Chapter 13 Trustee reported that the First Meeting of Creditors was completed on December 17, 2010. 10-41847; December 17, 2010 Trustee Docket Entry Report. This reflects that the Chapter 13 Trustee had documentation of Debtor's Social Security Number. The First Meeting of Creditors should not have been concluded unless Debtor had provided all of the necessary information and documents, including documentation of her Social Security Number.

The Social Security Number stated on Debtor's Statement of Social Security Number (10-41847; Dckt. 5) is the same as the Social Security Number as stated on the Statement of Social Security Number (Dckt. 23, 24) in this bankruptcy case.

Given Debtor's frustration in attempting to obtain a new Social Security Card and given that it was documented in her 2010 case, if Debtor cannot obtain a new Social Security Card, it appears that the court may rely upon the court's records showing the documentation of the Social Security Number in the 2010 case.

The court issued an Order to Show Cause why the Court should not authorize the use of the Social Security Number, as documented in Debtor's 2010 Chapter 13 case, 10-41847.

The U.S. Trustee provided a Response to the Order to Show Cause. Dckt. 18. The U.S. Trustee has been able to provide documentation from the 2010 case that the Chapter 13 Trustee affirmatively stated that the Social Security Number had been documented. Response, ¶ 6, Dckt. 18; and Declaration, ¶ 2, Dckt. 19.

The U.S. Trustee concludes under the specific and unique (in the court's words) circumstances of this case and Debtor, the U.S. Trustee does not oppose the court authorizing the documentation of the Social Security Number of Debtor for this case be based on the documentation of the Debtor's Chapter 13 case. The court knows that all of the parties appreciate the U.S. Trustee obtaining the underlying information and constructively assisting in the resolution of this issue.

Therefore, upon review of the files in this case and Debtor's prior bankruptcy case, 10-41847, the U.S. Trustee's Response, the court shall order that Debtor Georgia Miles is deemed to have documented the Social Security Number provided in this case (Statement of Social Security Number, Dckt. 23) based upon that same Social Security Number having been documented to the Chapter 13 Trustee in Debtor's prior Chapter 13 case, 10-41847.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Order to Show Cause having been presented to the court, and upon review of the files in this case and Debtor's prior bankruptcy case, 10-41847, the U.S. Trustee's Response, and good cause appearing;

**IT IS ORDERED** that Debtor Georgia Miles is deemed to have documented the Social Security Number provided in this case (Statement of Social Security Number, Dckt. 23) based upon that same Social Security Number having been documented to the Chapter 13 Trustee in Debtor's prior Chapter 13 case, 10-41847.

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

-----

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on August 21, 2021. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor (*pro se*) has not filed opposition. If the *pro se* Debtor appears at the hearing, the court shall consider the arguments presented and determine if further proceedings for this Motion are appropriate.

|   |
|---|
| <b>The Motion to Dismiss is <span style="color: red;">XXXXX</span>.</b> |
|---|

The Chapter 7 Trustee, J. Michael Hopper ("Trustee"), seeks dismissal of the case on the grounds that Georgia A. Miles ("Debtor") did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341.

Alternatively, if Debtor's case is not dismissed, Trustee requests that the deadline to object to Debtor's discharge and the deadline to file motions for abuse, other than presumed abuse, be extended to sixty days after the date of Debtor's next scheduled Meeting of Creditors, which is set for 04:00 p.m. on September 29, 2021. If Debtor fails to appear at the continued Meeting of Creditors, Trustee requests that the case be dismissed without further hearing.

## **DEBTOR'S RESPONSES**

Debtor filed a Response on September 3, 2021 stating that she was unable to appear at the Meeting of Creditors because

the signal was bad due to the fires the  
line said all circuits were busy. Plus



I still don't have my SSI card and  
I have tried everything to get it.

Dckt. 105.

Debtor then filed a second Response on September 7, 2021 further stating

Due to fires + signal all circuits are busy  
there are fires all over north and it is  
effecting many locations even in the valley  
for faxes emails + texts and calls. It also  
needs to be postponed due to the fact of no  
SSI card at this time.

Dckt. 108.

## **DISCUSSION**

Debtor did not appear at the Meeting of Creditor's. Attendance is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay that is prejudicial to creditors and is cause to dismiss the case. 11 U.S.C. § 707(a)(1).

At the hearing Debtor presented the court with the challenges she has and is facing in obtaining documentation of her Social Security number. The court address the requirement that she be able to provide such in order to prosecute the case. Pursuant to other order of the court it has been deemed that documentation of Debtor's Social Security Number has been made based on it having been documented in Debtor's prior Chapter 13 case (10-41847).

### **September 29, 2021 Trustee Report**

On September 29, 2021 J. Michael Hopper filed a Trustee Report. The report indicates the Debtor did not appear at the 341 Meeting of Creditors and is *pro se*. The First Meeting was continued to November 3, 2021 at 4:00 pm via Telephone Conference. The continuance was to allow the court to determine whether Debtor was able to document her Social Security Number in this case.

### **October 28, 2021 Hearing**

At the hearing, **XXXXXXXXXX**

**IT IS ORDERED** that the Motion to Dismiss is **xxxxxx**

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

-----

The Order to Show Cause was served by the Clerk of the Court on Debtor (*pro se*) and Chapter 13 Trustee as stated on the Certificate of Service on September 19, 2021. The court computes that 39 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: \$32.00 due on September 3, 2021.

|   |
|---|
| <b>The Order to Show Cause is <span style="color: red;">XXXXXXX</span>.</b> |
|---|

The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: \$32.00.

This \$32.00 fee was for Debtor filing an amended Master Mailing List, to include an "SSI Office" in Yuba City, California, Medicare in Lawrence, Kansas, and Debtor stating that she was changing her address. It does not appear that Debtor has filed Amended Schedules to include these creditors.

It also does not appear that Debtor has filed with the court a Notice of Change of Address. (Form available on the court's webpage under Information for Debtor's link.)

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Order to Show Cause is XXXXXXX

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

-----

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 10, 2021. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

The Motion to Waive Financial Management Course Requirement, Waive Section 1328 Certificate Requirement, Continue Case Administration has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion to Waive Financial Management Course Requirement, Waive Section 1328 Certificate Requirement, Continue Case Administration filed by Movant is denied.**

Peter G. Macaluso ("Movant"), the former attorney for deceased debtor, Bradley Jay Gilbreath ("Debtor"), filed this motion for omnibus relief. Movant seeks permission to proceed as though the death of Debtor has not occurred. Movant seeks to waive the 11 U.S.C. § 1328 instructional course requirement concerning personal financial management. <sup>FN.1.</sup>

-----

FN. 1. The Motion is drawn stating that counsel is representing the Debtor, Bradley Gilbreath. But it also states that Bradley Gilbreath is deceased. Counsel has no client, though he may owe duties and

obligation to Mr. Gilbreath's estate, which would ultimately enforced by Mr. Gilbreath's successor executor, administrator, or representative. Counsel does not purport to represent any successor for Debtor and none has been presented to, or appointed by, this court.

-----

## DISCUSSION

Federal Rule of Bankruptcy Procedure 1016 provides, "Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred."

Federal Rule of Bankruptcy Procedure 7025 incorporates Federal Rule of Civil Procedure 25, which provides that "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." *Hawkins v. Eads*, 135 B.R. at 384. Under Federal Rule of Bankruptcy Procedure 9014, Motions are considered contested matters that apply to Federal Rule of Bankruptcy Procedure 7025.

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16th Edition, § 7025.02, which states:

Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.

The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by

Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**

**The motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004 . . . .**

(emphasis added); *see also Hawkins v. Eads, supra*.

Here, there is no successor of interest. Although death or incompetency does not automatically abate the liquidation of this case, since motions are contested matters, there must be a substitution of the deceased debtor in order for the motion to be granted. Since no such substitution has occurred, the court declines to waive the requested requirements at this time.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Waive Financial Management Course Requirement, Waive Section 1328 Certificate Requirement, Continue Case Administration, as to Debtor, filed by Peter G. Macaluso, the deceased debtor's attorney, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Waive Financial Management Course Requirement, Waive Section 1328 Certificate Requirement, Continue Case Administration filed by Movant is denied without prejudice.

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**  
-----

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession (*pro se*), creditors, parties requesting special notice, creditors holding the twenty largest unsecured claims and Office of the United States Trustee on October 14, 2021. By the court's calculation, 14 days' notice was provided. 14 days' notice is required. FED. R. BANKR. P. 4001(b)(2) (requiring fourteen days' notice).

The Motion for Authority to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor in Possession, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, -----

**The Motion for Authority to Use Cash Collateral is granted.**

Focus Management Group USA ("Plan Administrator") moves for an order approving the use of cash collateral from a stipulation with SBN V AG I LLC. Plan Administrator requests the use of cash collateral to operate the Reorganizing Debtor's business and pay Plan Expenses.

Plan Administrator proposes to use cash collateral for the following expenses:

Plan Expenses in accordance with the Stipulated Budget such as insurance and professional fees for the time period of October 1, 2021 to December 31, 2021.

A windup period if the estate is fully administered at that time and as may be extended by Summit's further stipulation.

## **APPLICABLE LAW**

Pursuant to 11 U.S.C. § 1101, a debtor in possession serves as the trustee in the Chapter 11

case when so qualified under 11 U.S.C. § 322. As a debtor in possession, the debtor in possession can use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—

(I) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 4001(b) states:

(b)(2) Hearing

The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

## **DISCUSSION**

The Plan Administrator has shown that the proposed use of cash collateral is in the best interest of the Estate. The proposed use provides for operating the Reorganizing Debtor's business and paying Plan Expenses. The Motion is granted, and the Plan Administrator is authorized to use the cash collateral for the period October 1, 2021, through December 31, 2021, including required adequate protection payments. The court does not pre-judge and authorize the use of any monies for "plan payments" or use of any "profit" by the Plan Administrator. All surplus cash collateral is to be held in a cash collateral account and accounted for separately by the Plan Administrator.

**Counsel for the Plan Administrator shall prepare and lodge with the court a proposed order**

consistent with this ruling.

9. [21-23134](#)-E-7      **MICHAEL/CAROLINE PANOPIO**      **MOTION TO CONVERT CASE FROM CHAPTER 7 TO CHAPTER 13 O.S.T. 10-18-21 [31]**  
[RJ-2](#)

Items 9 thru 10

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**

-----

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Improper Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditors, and Office of the United States Trustee on October 14, 2021. By the court's calculation, 14 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(4) (requiring twenty-one-days' notice).

Movant provided fourteen days' notice of this Motion. Federal Rule of Bankruptcy Procedure 2002(a)(2) requires a minimum of twenty-one days' notice of the hearing. Movant has provided 7 fewer days than the minimum. However, on October 20, 2021, the court issued an order to allow the Motion to Convert to be heard at 10:30 am on October 28, 2021. Dckt. 39. Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, -----.

|   |
|---|
| <p><b>The Motion to Convert the Chapter 7 Bankruptcy Case to a Case under Chapter 13 is <b>xxxxxxx</b>.</b></p> |
|---|

Michael Mark Panopio and Caroline Macaraeg Panopio ("Debtor") seeks to convert this case from one under Chapter 7 to one under Chapter 13. The Motion asserts the case should be converted because conversion by debtor of this case to one under Chapter 13 is a matter of right in this instance. Debtors submitted a declaration stating they would like to convert this matter because they would like to keep their two automobiles. Dckt. 33 at ¶ 2.

The Chapter 7 Debtors have filed a Motion to Convert this case to one under Chapter 13. Dckt. 31. The Motion asserts the right to convert a case as granted debtors in 11 U.S.C. § 706(a). In the



Declaration in Support, Debtors state that they need to convert the case to one under Chapter 13 so that they can save a vehicle from repossession and sale (the Motion for Relief having been filed by the creditor with the debt secured by the vehicle).

In the Opposition to the Motion for Relief and Declaration of Debtors, they state that they need two vehicles. Dckts. 25, 26. The vehicle to be saved is identified as a 2017 Dodge Challenger which secures a debt stated by creditor to be (\$67,928.51). Mtn for Relief, ¶ 3; Dkt. 15. The Motion for Relief further alleges that Debtors are in default with the contract payments April 2020 through August 2021, when the Chapter 7 case was filed.

The contractual payment is stated in the Motion for Relief to be \$1,181.07 a month. *Id.*, ¶ 4. Debtors list the Dodge Challenger as having a value of \$45,000. Schedule A/B, Dkt. 1. On Schedule I Debtors reporting having monthly gross income of \$14,385.27, which after mandatory and voluntary retirement contributions and other deductions, their monthly take-home pay is reduced to \$9,806.06. *Id.* Debtors also report getting a monthly contribution from parents in the amount of \$650. *Id.*

On Schedule J, Debtors state under penalty of perjury having necessary monthly expenses of (\$13,650), leaving them running a monthly deficit of (\$3,194). *Id.* This deficit is computed with Debtors assuming that they can reduce their car payments below the contractual amounts.

While stating that they have a “right” to convert to Chapter 13, Debtors have presented uncontroverted evidence that they cannot perform a Chapter 13 Plan. Though Debtor’s counsel argues that the “budget will be changed in the future,” one would suspect that if a budget could be changed, it would have been done at the time this case was filed.

At the hearing, **XXXXXXX**

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Convert the Chapter 7 Bankruptcy Case to a Case under Chapter 13 filed by Michael Mark Panopio and Caroline Macaraeg Panopio (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Convert the Chapter 7 Bankruptcy Case to a Case is **XXXXXXX**

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

-----

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on September 17, 2021. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

|   |
|---|
| <b>The Motion for Relief from the Automatic Stay is <span style="color: red;">XXXXXXX</span>.</b> |
|---|

AMERICREDIT FINANCIAL SERVICES, INC. DBA GM FINANCIAL ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2017 DODGE CHALLENGER, VIN ending in 8581 ("Vehicle"). The moving party has provided the Declaration of Aaron Rangel to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by MICHAEL MARK PANOPIO and CAROLINE MACARAEG PANOPIO ("Debtor"). It is stated in the Motion that Debtor entered into the contract to purchase this vehicle December 16, 2018. Motion, ¶ 1; Dckt. 15. Exhibit A is a copy of the Contract, for which Debtor agreed to pay \$61,506.63 to purchase the vehicle, financing \$59,506.63 of the purchase price at 15.75% interest over six years, for a total purchase price in excess of \$100,000. Dckt. 20 at 2.

Movant argues Debtor has not made 16.36 pre-petition payments, with a total of \$19,327.91 in pre-petition payments past due. Declaration, Dckt. 18; Information Sheet, Dckt. 21

#### **J.D. Power Market Values Guide Provided**

Movant has also provided a copy of the J.D. Power Market Values Guide for the Vehicle. The Report has been properly authenticated and is accepted as a market report or commercial publication

generally relied on by the public or by persons in the automobile sale business. FED. R. EVID. 803(17).

## **DEBTOR'S OPPOSITION**

On October 18, 2021, Debtor filed an opposition claiming:

1. They would like to convert the case in order to save the car from repossession.
2. They need two automobiles and this automobile is essential to their rehabilitation.
3. They will be changing their budget in order to pay for needs essential such as this automobile.

Although Debtor's opposition was filed four days late, the court notes Debtor filed a declaration indicating good faith attempts to file their opposition on time and unanticipated obstacles. Dckt. 35. Therefore, the court allow the Motion to proceed as if the opposition was filed on time.

## **DISCUSSION**

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$67,928.51 (Declaration, Dckt. 18), while the value of the Vehicle is determined to be \$53,825.00, as stated on the J.D. Power Market Values Guide Valuation Report, which is more than the Debtor's opinion of retail value stated in Schedules A/B and D, \$45,000.00.

### **11 U.S.C. § 362(d)(1): Grant Relief for Cause**

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

### **11 U.S.C. § 362(d)(2)**

A debtor has no equity in property when the liens against the property exceed the property's

value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. 11 U.S.C. § 362(g)(2); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988). Based upon the evidence submitted, the court determines that there is no equity in the Vehicle for either Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the Vehicle is *per se* not necessary for an effective reorganization. See *Ramco Indus. v. Preuss (In re Preuss)*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

However, Debtor seeks to convert this case to Chapter 13 and pay Creditor through a bankruptcy plan, or as Creditor may otherwise agree. At the hearing, **XXXXXXX**

~~The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Vehicle, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.~~

### **Request for Waiver of Fourteen-Day Stay of Enforcement**

~~————— Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court.~~

~~————— Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is granted.~~

~~————— No other or additional relief is granted by the court.~~

The court shall issue an order substantially in the following form holding that:

~~————— Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.~~

~~————— The Motion for Relief from the Automatic Stay filed by MICHAEL MARK PANOPIO and CAROLINE MACARAEG PANOPIO (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~————— **IT IS ORDERED** the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as a 2017 DODGE CHALLENGER, VIN ending in 8581 (“Vehicle”), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.~~

**IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.

No other or additional relief is granted.

11. [20-23267-E-7](#) **SHON/JILL TREANOR** **MOTION TO COMPROMISE**  
[DNL-11](#) **Pro Se** **CONTROVERSY/APPROVE**  
**SETTLEMENT AGREEMENT WITH**  
**FRALEY & FRALEY, PC AND GARY**  
**FRALEY**  
**9-21-21** [\[348\]](#)

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

-----

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 21, 2021. By the court's calculation, 37 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Approval of Compromise has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

**The Motion for Approval of Compromise is XXXXX.**

Hank M. Spacone, the Chapter 7 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Fraley & Fraley, PC and Gary Fraley ("Settlor"). The claims and disputes to be resolved by the proposed settlement are a Pre-Petition Transfer of a 2019 Keystone Outback UltraLite Toy Hauler ("Toy Hauler") to the Law Firm and Attorney in exchange for legal services rendered to the Debtors in connection with the Bankruptcy Case.

Movant and Settlor seek to resolve these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set

forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 352):

- A. The Fraley Parties shall pay the Trustee \$10,000.00 as follows: (a) \$5,000.00 deposit upon of execution of this Agreement and (b) \$5,000.00 within seven (7) calendar days of entry of the approval order.
- B. The Trustee and Fraley Parties shall execute broad mutual releases and waive the provision of California Civil Code Section 1542.

On September 23, 2021 the Court held a Status Conference on a Motion for Court to Investigate Fees Charged For Failure to Provide Services by several counsel Debtor had hired. In connection with that Status Conference the Trustee filed a Status Report indicating that the itemized billing statement provided by Mr. Fraley for \$10,475.00 of fees in preparation for the filing of the Chapter 7 bankruptcy case. As discussed by the court in the Civil Minutes from that hearing, such fees in excess of \$10,000.00 in fees is well outside the norm for filing a Chapter 7 case in this District. Civil Minutes, Dckt. 354. In those Civil Minutes and at the hearing the court discussed the provisions of 11 U.S.C. § 329 and that no party in interest had sought a determination of the reasonableness of fees.

For the present Motion to Approve Compromise does not provide the court with evidence or analysis why the court should conclude that allowing \$10,475.00 for preparation to file a Chapter 7 case (which was never filed or prosecuted by Mr. Fraley) is proper or reasonable.

Additionally, when filing the Motion to Approve Compromised, the Trustee relied on valuation of the Trailer that was provided by Mr. Fraley, not one obtained by the Trustee. The court noted at the Status Conference that the valuation relied upon by the Trustee was not for the fair market value of the Trailer, nor an orderly marketing and sale value of the Trailer.

Rather, the Trustee based the proposed Settlement on a Forced Liquidation Value of the Property, as if the Trustee and bankruptcy estate did not have the protections afforded by Congress in under the Bankruptcy Code to conduct an orderly, commercially reasonable sale of the Trailer. Additionally, the valuation was made without the appraiser inspecting the Trailer. Status Report, Dckt. 346.

Additionally, the Court's recollection was that there is a \$1,100,000.00 real property to be administered by the Trustee, having succeeded to the Debtors' right as the beneficiary of the Estate of Cheryl Gortmeyer. Amended Schedule C, Part 1 § 2; Dckt. 139 at 10. <sup>FN.1.</sup> In light of the substantial claims filed in this case, it appears the sale of said property will be necessary and the case not being resolved by the compromise of the dispute concerning the trailer. This compromise is of the surplus assets and interest which ultimately would go back to the Debtors.

---

FN. 1. While not presented as evidence, the court notes that on Zillow.com a value of \$1,699,000 is given for this property, and on Redfin.com it is also listed as having a value of \$1,699,000. On Redfin.com, the property is described as:

Sitting on top of the world! Fabulous panoramic view from this hilltop paradise overlooking Green Valley, Mt Diablo and beyond. This is a single story, 4 bedroom, 3 bath, plus den, custom home with views from almost every room and

sits on 5 private acres. A magnificent waterfall greets you as you enter the home. The open gourmet kitchen features high end stainless appliances, island with cooktop and sink and a separate wine refrigerator. Solar powered with many energy saving features such as low voltage lighting. You can certainly enjoy the outdoors with the cool pool featuring a cascading waterfall, two outdoor kitchens, a firepit and even a putting green! All with a view! Relax and enjoy...this is resort living all while being at home.

<https://www.redfin.com/CA/Fairfield/4390-Emerald-Ridge-Ln-94534/home/2543843>. The description on Zillow.com appears to be identical.

The court has authorized the Trustee to employ a Realtor for the marketing and sale of this property. Amd. Order, filed August 6, 2021; Dckt. 340. It appears that the Trustee will be selling a much more valuable property than the Debtor thought when amending the Schedules.

-----

The Parties conducted a productive discussion at the Status Conference and Hearing on Debtors' Motion. Debtors provided further explanation of their frustration concerning the wrongs that have been done to them and are taking steps to address these claims.

The Parties also addressed steps needed for Debtors and Trustee to have a valuation of the trailer at issue from a source they are both comfortable with. Additionally, the Parties discussed if the proceeds from the sale of the trailer were part of a surplus bankruptcy estate which could be immediately abandoned to Debtor. Lastly, they discussed methods by which Debtor Jill Treanor, a licensed realtor, could provide constructive suggestions for the marketing of the sale of real property of the estate.

## **SUPPLEMENTAL PLEADINGS FILED IN SUPPORT OF MOTION**

On September 30, 2021, the Trustee filed Exhibits In Support of Motion/Application to Compromise Controversy/Approve Settlement Agreement with Fraley & Fraley, PC and Gary Fraley, Dckt. 359. The Exhibit is an authenticated Appraisal Report by West Auctions, conducted on September 28, 2021 for the Trustee.

### **Declaration of Hank M. Spacone In Support of Motion/Application to Compromise Controversy/Approve Settlement Agreement with Fraley & Fraley, PC and Gary Fraley**

On September 30, 2021, Trustee, Hank M. Spacone, filed a Supplemental Declaration of Hank M. Spacone In Support of Motion/Application to Compromise Controversy/Approve Settlement Agreement with Fraley & Fraley, PC and Gary Fraley, Dckt. 360. The Declaration indicates on September 23, 2021, the Court "expressed interest in an appraisal of the trailer" that is the subject of this motion.<sup>Fn.1.</sup> The Trustee further testifies that on September 27, 2021, at the Trustee's request, West Auctions inspected the trailer that is the subject of this motion for the purpose of providing an opinion as to the value. Lastly, on September 28, 2021, the Trustee received an Appraisal Report from West Auction, a copy of which is filed as Exhibit D (Dckt. 359), which is addressed below.

-----

FN. 1. Presumably, the Trustee in administering property in what may be a surplus estate would also be "interested" in knowing the value of property that the Trustee is administering.

-----

**Declaration of Molly Pollard In Support of Motion/Application to Compromise Controversy/Approve Settlement Agreement with Fraley & Fraley, PC and Gary Fraley**

On September 30, 2021, the Trustee filed a Declaration of Molly Pollard In Support of Motion/Application to Compromise Controversy/Approve Settlement Agreement with Fraley & Fraley, PC and Gary Fraley, Dckt. 362. The Declaration states that Molly Pollard is an appraiser and has been employed by West Auctions, Inc. since 2017. West Auctions was retained to provide an opinion of the (1) retrospective orderly liquidation value and (2) current orderly liquidation value for the Toy Hauler. Ms. Pollard authenticates the Appraisal Report filed as Exhibit D.

In the Declaration, Ms. Pollard states her opinion that, less customary storage, transportation, and liquidation costs, the net value of the Toy Hauler was: (1) \$19,405.00 on April 1, 2020; and (2) \$22,635.00 on September 27, 2021. In making this determination Ms. Pollard used the sales comparison approach to determine the values of the Toy Hauler in its condition at the time of inspection. This method of valuation involves comparison of the subject property with similar items that have sold within the market considered most common for the subject property.

While stating the net value, the Declaration does not state the “customary storage, transportation and liquidation costs” that Ms. Pollard deducts from the gross sales price - the fair market value.

The Trustee’s Appraisal Report states the Toy Hauler has a Current Orderly Liquidation Value of \$29,100.00. What stands in sharp contrast with the current valuation and the prior forced liquidation is that the Forced Liquidation Value was stated to be \$21,000.00, based upon second hand information from the Fraley Parties, but the Orderly Liquidation Value is stated to be \$29,100.00 – an increase of almost 40%. Motion, ¶ 5, Dckt. 348; Trustee’s Declaration, ¶ 7; Dckt. 351.

The Appraiser projects that from the Orderly (as opposed to a forced, distress, anything anybody will pay) Sale, there will be (\$6,465.00) in transportation, storage, and commission. These amounts are not broken down. If there was a 15% commission, that would leave (\$2,100) for transportation and storage. The several thousand transportation and storage costs are not explained.

**Declaration of Gary Ray Fraley In Support of Motion/Application to Compromise Controversy/Approve Settlement Agreement with Fraley & Fraley, PC and Gary Fraley**

On October 1, 2021, Gary Fraley filed a Declaration in Support of the Motion to Approve Settlement. Dckt. 366. Mr. Fraley summarizes his extensive bankruptcy legal experience.

With respect to the 2019 Trailer, Mr. Fraley testifies that his former client told him the Trailer was purchased for \$27,000. *Id.*, ¶ 10. Additionally, Mr. Fraley testifies there should only be an auctioneer’s costs of sale of 10%, resulting in a value of \$26,190 for the Trustee. Based on Mr. Fraley’s testimony, there is at least \$16,000 of value in excess of the fees claimed by Mr. Fraley.

Mr. Fraley discusses the meeting with Debtors and the representation he sought to provide for them. This includes turning the Trailer over to the Trustee, with Mr. Fraley asserting a lien on it for his



fees. The Trustee then could (presumably promptly) sell the Trailer, pay Mr. Fraley's claim secured by the lien, and have the remaining proceeds for the bankruptcy estate. *Id.*, ¶ 5. In paragraph 15 of the Declaration, Mr. Fraley repeats that he told Debtors he would turn the Trailer over to the Trustee, referencing this in an April 9, 2020, email. Mr. Fraley testifies that he obtained possession of the Trailer on March 31, 2020, and transferred title to he and his wife's names on April 2, 2020. *Id.*, ¶ 13.

At this juncture, the court notes that Debtors' Chapter 7 bankruptcy case was filed on June 30, 2020, just ninety-one (91) days after Mr. Fraley testifies that he obtained possession of the Trailer, but eighty-nine (89) days after Mr. Fraley testifies that he put title of the Trailer into his and his wife's name.

It is now four hundred and eighty-five (485) days after the bankruptcy case has been filed and Mr. Fraley remains in possession of the Trailer worth \$29,000 for which Mr. Fraley asserts the right to be paid \$10,000 +/- in legal fees. During these four hundred and eighty-five days, the bankruptcy Trustee has been unable to sell the Trailer, recover the proceeds, and pay, if it is not disputed, the \$10,000 +/- in fees Mr. Fraley asserts to be owed or to have been owed when title to the \$29,000 Trailer was put in his and his wife's names.

Mr. Fraley also testifies that "last spring and summer" he attempted to sell the Trailer on eBay. *Id.*, ¶ 34. It is not clear whether this was the spring and summer of 2021 or 2020 (in the depth of the COVID pandemic). Either way the efforts to sell were occurring after the June 2020 commencement of this bankruptcy case and undertaken notwithstanding representations by Mr. Fraley that he would turn over the Trailer to the bankruptcy Trustee and assert his lien rights therein.

Mr. Fraley directs the court to Exhibits 1 and 2, which are the contracts that he had with the two debtors. *Id.*, ¶ 22. Exhibit 1 is a joint contract between Mr. Fraley and Shon and Jill Treanor. Dckt. 367. For filing the joint bankruptcy case, Mr. Fraley charged the two debtors \$9,999.00. The notes at the end of the contract state the \$9,999.00 was paid with the "trade" of the Trailer.

Exhibit 2 is a second contract with Jill Treanor in which Mr. Fraley was to be paid \$9,999.00 for filing a separate Chapter 7 case for Jill Treanor. *Id.* at 10. At the end of the second contract the notes state the total fees for filing two Chapter 7 cases was \$19,998.00.

The two contracts state the services to be provided for payment of \$9,999.00 by each of the two debtors. These services are:

#### 4. Services Provided Under the Base Attorneys' Fees:

The services of the attorney included in the base fee are those normally contemplated for a Chapter 7 Bankruptcy case. They include the services listed below:

(a) All services reasonably necessary to fully inform the Client of their rights and responsibilities under the Bankruptcy Code, and to make an informed decision about filing a Chapter 7 Bankruptcy case.

(b) Advising the Client of all available exemptions under the law, and assisting the Client in claiming the exemptions that best serve the Client's

needs and desires.

(c) Assisting the Client in complying with all of the requirements imposed by the Bankruptcy Code, the Local Rules, and the Bankruptcy Rules.

(d) Preparation and electronic filing of the Bankruptcy Petition, Schedules, and Statements required under the law.

(e) Drafting and mailing to the Client a letter regarding attendance at the Meeting of Creditors, and advising the Client of the documents required at and in advance of that hearing.

(f) Attending the First Meeting of Creditors (required Section 341 Meeting) with the Client, and assisting the Client in answering questions posed by the Trustee or any Creditor attending that hearing. Note: All questions will have to be answered by the Client at this meeting. Client agrees to appear at the Meeting of Creditors and bring with them an original Driver's license or California Identity card and an original Social Security card.

(g) Assisting the Client in performing the Client's Statement of Intentions, provided that the Client pays the Non-Base Fee for any Redemptions (\$700.00) each if requested by Client prior to the Chapter 7 case being filed.

(h) Assisting the Client in complying with all proper and timely requests for information and/or documents by the Bankruptcy Trustee, the Office of the US Trustee, the Court, or any other parties involved in the case.

(i) Communicating with the creditors and other parties to the extent necessary to facilitate in the administration of the case.

Contracts, ¶¶ 4, Exhibit 1, p. 2 of 8; Exhibit 2, p. 2 of 8; Dckt. 367. These services consist of preparing the Schedules, using a computer to electronically file the bankruptcy documents, send Debtors a letter telling them when to appear at the First Meeting of Creditors, and appearing at the First Meeting of Creditors with the two debtors.

The expressly listed services not included above are stated in the two contracts as follows:

#### 5. Non-Base Fee Legal Services

In some Chapter 7 Bankruptcy cases, the Attorney may be required to provide services beyond those contemplated in the Base Fee, or the Client may request the performance of Non-Base Fee Legal Services. Those required by the Court or the Trustee will be provided and client shall pay the reasonable value of these services at Attorney's standard legal fees.

(a) Representing the Client in any adversary proceeding. Attorney is not

required to represent Client in any adversary proceeding unless Attorney chooses to do so.

(b) Representing the Client in any contested motion to avoid any type of lien or judgment unless previously agreed to before filing of the case.

(c) Representing the Client in a motion to continue, impose, or extend the Automatic Stay.

(d) Representing the Client in any action to enforce the Automatic Stay or the Discharge Injunction.

(e) Representing the Client in any contested motions for Relief from the Automatic Stay.

(f) Representing the Client in any motions to Redeem Personal Property.

(g) Filing any amendments to the Schedules, Statements, or Petition, unless such amendments are required due to a mistake or oversight by the attorney.

(h) Attending any Continued Meeting of Creditors beyond the first Meeting of Creditors, if such are required.

(i) Representing the Client in any Motions to Compel Abandonment of an asset, including, but not limited to, a business, a vehicle, business assets, or any real property owned by Client.

(j) Representing the Client in a Motion to Reopen a case where the case has been discharged, or closed without a discharge.

(k) Representing the Client in an audit by the Office of the US Trustee. However, there will be no charge if the audit is random.

(l) Representing the Client in any complaints to determine the dischargeability of tax debts, or letter requests for tax abatement

(m) Representing the Client in any other matters not specifically designated under Section 4 of this Agreement.

Contracts, ¶¶ 4, Exhibit 1, p. 3 of 8; Exhibit 2, p. 3 of 8; Dckt. 367.

Thus, the almost \$20,000 in legal fees is to fund the preparation of the individual debtor Chapter 7 bankruptcy documents, electronically file them, and attend the first First Meeting of Creditors, and nothing more.

## **Second Declaration of Gary Ray Fraley Re Attorney's Fees**

Gary Fraley filed a second Declaration concerning the attorney's fees which he seeks to recover from the value of the Trailer. The legal services stated in the Declaration as having been provided for the two debtors are summarized as follows (identified by the paragraph number used in this second Declaration).

- 9. March 18, 2020, First Consultation with Shon Treanor.....2.0  
Hours
- 13. March 21, 2020, Second Consultation with Shon Treanor.....1.5  
Hours
- 15. March 23, 2020, Consultation with Jill and Shon Treanor.....4.0  
Hours
- 16. March 27, 2020, Consultation with Shon Treanor.....1.0  
Hours
- 27. Time spent researching exemption of house in trust issues..... Time not  
Stated
- 28. April 1, 2020, Talked with Treanors about State Court and  
transferring Trailer..... Time not Stated
- 31. April 2, 2020, Office began processing information for filing.....Time not  
Stated
- 48. Met with Treanors to explain why separate cases should be filed.....1.5  
Hours
- 52. April 7, 2020, Treanors fired Gary Fraley.

Dckt. 365.

Exhibit 12 filed by the Fraley Parties is a billing statement for the time spent by Mr. Fraley for the fees sought from the Trailer proceeds. The persons billing are Gary Fraley, at \$450 an hour; Nedra Fraley, at \$350 an hour, and BEG, a paralegal, at \$120 an hour. Gary Fraley billed 17.5 hours, totaling \$7,875; Nedra Fraley billed 2 hours at \$350, totaling \$700; and BEG billed 16.5 hours, totaling \$1,980. These total \$10,475. There are additional charges of \$860 for the costs of transfer and \$400 for storage.

**Memorandum of Points and Authorities In Support of Motion/Application to Compromise Controversy/Approve Settlement Agreement with Fraley & Fraley, PC and Gary Fraley**

On October 18, 2021, Gary Ray Fraley filed a Supplemental Memorandum of Points and Authorities re Attorney Fees and Argument In Support of Motion to Approve Settlement, Dckt. 371. The Memorandum of Points and Authorities provides why Mr. Fraley is entitled to Attorney Fees. Mr. Fraley argues his services are reasonable compensation for actual, necessary services rendered by an

attorney. This is evidence by:

- (A) Time Spent on Services - Mr. Fraley's time is indicated in Exhibit 12, Dckt. 367;
- (B) Rates Charged - Mr. Fraley argues his rates were reasonable given the length of practice and experience in the consumer bankruptcy field;
- (C) Necessary Services - Mr. Fraley argues he was able to maneuver around a \$1,000,000.00 Abstract Judgment, preserve the Debtors' \$100,000.00 homestead exemption, and was able to provide a beneficial alternative because their income from the past six months put their ability to discharge debts in jeopardy;
- (D) Amount of Time - Mr. Fraley argues the amount of time was reasonable given the multiple issues in this case;
- (E) Special Skills - Mr. Fraley argues he has 43 years of practice in bankruptcy law and has been a California State Bar Board Certified Law Specialist for nearly 20 years; and
- (F) Reasonable Compensation - Mr. Fraley argues based on a survey his wife, Mrs. Fraley, took 15 to 20 years ago, Mr. Fraley's fees are 25% to 50% of what the average fees being charged were with comparable certification and experience.

Mr. Fraley further argues his fees are reasonable based on the Lodestar factors:

- (1) Time and Labor Required - Mr. Fraley argues time and labor were reasonable given the circumstances;
- (2) Novelty and Difficulty - Mr. Fraley argues he had to think outside the box to work around a creditor attaching a \$1,000,000.00 judgment lien to Debtors' homestead;
- (3) Skill Requisite - Mr. Fraley argues this factor based on his argument above;
- (4) Preclusion of Other Employment - Mr. Fraley argues he would not be able to take on any other case that required immediate services;
- (5) Customary Fee - Mr. Fraley charged within the top 1-2% of what he normally charges, however, he argues the case had significant issues requiring more services than usual;
- (6) Type of Fee - Mr. Fraley does not discuss this factor;
- (7) Time Limitations - Mr. Fraley had to do an emergency file to halt the

State Court hearing;

- (8) Amount Involved - Mr. Fraley feels there is no question of the dollar value of my services;
- (9) Experience and Reputation - Mr. Fraley claims his practice to be of quality and integrity but concedes that there has been unhappy Trustees and Attorneys based on his efforts for his clients;
- (10) Undesirability of Case - Mr. Fraley had to compare information they were given with the information they obtained;
- (11) Nature and Length of Relationship with Client - Mr. Fraley does not discuss;
- (12) Awards in Similar Cases - Mr. Fraley does not discuss.

## DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;
2. Any difficulties expected in collection;
3. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and
4. The paramount interest of the creditors and a proper deference to their reasonable views.

*In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1986); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Movant argues that the four factors have been met.

Under the settlement, Movant shall recover \$10,000.00 in satisfaction of the Estate's claim for recovery of the property. Settlor provided Movant with an appraisal value of the Toy Hauler from West Auction. Exhibit C, Dckt. 352. As of June, 2021, the Toy Hauler has a forced liquidation value of \$21,000.00. *Id.*

However, when the Trustee contacted the Auctioneer and had an appraisal done not for a forced liquidation, but an orderly liquidation, the value increased to more than \$29,000.00. Based on

Mr. Fraley's analysis, after what he determines to be reasonable costs of sale, there should be \$16,000 of net value for the estate if the settlement amount is paid to Mr. Fraley.

### **Probability of Success**

Movant argues this factor supports settlement because the value of the trailer is \$19,000.00 and the asserted value of legal services is \$10,475.00. Therefore the amount recovered would be \$8,525.00. The \$8,525.00 amount is less than the proposed \$10,000.00 settlement payment, so the Settlement Agreement is more favorable to the Bankruptcy Estate.

However, the Supplemental Evidence presented by both the Trustee and Mr. Fraley show that this analysis is flawed, and that the value of the Trailer is substantially greater and the value is well in excess of any obligation that Mr. Fraley asserts he could be owed.

### **Difficulties in Collection**

This factor is of neutral as the Trustee believes that the Fraley Parties still have the Trailer and the liquidation value of which exceeds the likely recovery amount. Additionally, the Fraley Parties appear to be fiscally solvent and to the extent that the transfer is avoided, a monetary judgment can be awarded and collected. 11 U.S.C. § 550.

### **Expense, Inconvenience, and Delay of Continued Litigation**

This factor supports a settlement to recover the value for the estate, if the actual net value of the Trailer is obtained. Based on the evidence presented, the \$10,000 settlement amount is not the value shown to exist for the estate in the property.

### **Paramount Interest of Creditors**

This factor supports settlement because it is the Trustee's opinion that the settlement is in the best interest of the estate because: (a) an efficient administration of the Bankruptcy Estate will follow; and (b) a net positive return to creditors on account of the claim will be ensured.

However, Movant again fails to acknowledge under the current liquidation value, Creditors would receive \$8,625.00 more under the recovery amount than the agreed upon settlement amount. Additionally, the Trustee does not address whether this is a surplus estate and whether creditors will be paid 100% from other assets and this asset is part of the surplus estate that will be returned to the Debtor.

### **Additional Factor - Determination of Reasonable Attorney's Fees** **11 U.S.C. § 329**

Recognizing that potential debtors, whether through a lack of sophistication, an unrealistic belief of what can be achieved (pulled off) under the Bankruptcy Code, or those seeking to "game the system," can seek to pay or be convinced to pay legal fees well beyond what is reasonable for what may properly be done under the Bankruptcy Law, Congress added a special provision for review of fees charged by attorney's doing work in connection with or contemplation of a bankruptcy case.

§ 329. Debtors' transactions with attorneys

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to—

(1) the estate, if the property transferred—

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

11 U.S.C. § 329. The discussion of this Code provision in Collier on Bankruptcy includes the following:

§ 329.04

...

[1] “Reasonableness” of Compensation

Under section 329(b), it is the “reasonableness” of the particular transaction which is subject to examination. Thus, any payment or agreement examined under section 329(a) is valid only to the extent of a reasonable amount as determined by the court. This is consistent with the requirement under section 330 that professionals receive only “reasonable compensation” for their services.

What constitutes reasonableness is a question of fact to be determined by the particular circumstances of each case. The requested compensation may be reduced if the court finds that the work done was excessive or of poor quality. Similarly, compensation may be reduced if the court determines that the attorney took advantage of the debtor or a third party paying fees on the Debtors’ behalf. The reasonableness of a prepetition fee agreement between a debtor and the Debtors’ attorney is an inquiry within the sound discretion of the bankruptcy court. The court, however, must make explicit findings when determining the reasonableness of the subject compensation.

...

[c] Assessment of Reasonable Value of Services; Relationship of Sections 329 and 330 of the Code

The court, in assessing the reasonable value of the services rendered, will be



governed by the criteria set forth in section 330. The policy underlying that section is to authorize compensation at a level comparable to that in nonbankruptcy cases. An example of the interplay between sections 329 and 330 of the Bankruptcy Code arises when determining the reasonableness of a prepetition retainer given to a Debtors' attorney for services both rendered prepetition and to be rendered postpetition.

### 3 Collier on Bankruptcy P 329.04 (16th 2021)

#### § 329.05

##### [1] Court Examination of Compensation; Fed. R. Bankr. P. 2017

Rule 2017(a) provides for court examination of compensation in the form of money paid or property transferred to an attorney prior to and in contemplation of the filing of a petition under title 11 by or against the debtor, or before entry of the order for relief in an involuntary case, for services rendered or to be rendered. Rule 2017(b) calls for court examination of payments or transfers to an attorney as compensation. Such examination may be on the court's own initiative or on motion by the debtor or the United States trustee. The court will examine payments or transfers to an attorney as compensation, or an agreement therefor, "after entry of the order for relief in a case under the Code," if the payment, transfer or agreement was for services in any way related to the bankruptcy.

...

##### [3] Proceedings for the Examination of Amount Paid; Jurisdiction

Proceedings for the examination of the amount paid are to be brought in the court having jurisdiction over the estate. Because Bankruptcy Rule 7004(d) provides that a summons and a notice of trial may be served at any place in the United States, a nonresident attorney of the debtor cannot escape a reexamination under section 329 of the compensation received from the debtor on the ground that the attorney is not subject to the process of the court and cannot be compelled to appear before a court in which a case under the Code is pending. Moreover, a state court has no jurisdiction to reexamine the transfer of property to an attorney in a bankruptcy case. Similarly, dismissal of a bankruptcy case does not restrict a bankruptcy court from retaining and exercising jurisdiction to order disgorgement in connection with that case.

##### [4] Proceedings for the Examination of Amount Paid; Who May Institute

Under Bankruptcy Rule 2017, the proceeding may be instituted on the court's own initiative under either subdivision (a) or (b). Any party in interest may also move for court review provided for in subdivision (a); however, the only parties who may move under subdivision (b) are the debtor and the United States trustee.

...

##### [7] Order for Restoration of Payment; Failure to Obey Held to Be Contempt of Court

When a court with proper jurisdiction over the attorney orders restoration of the payment, a failure to obey the order is a civil contempt of court. To remove the contempt citation, the attorney must furnish evidence of the attorney's present

resources, what became of the money taken, and the attorney's inability to comply with the court's order.

3 Collier on Bankruptcy P 329.05 (16th 2021)

Here, the court is first presented with contracts that would require the two debtors to pay almost \$20,000 to file two individual bankruptcy cases. Even paring it down to billing records, the Fraley Parties assert that \$10,475. This is for legal services over a seventeen day period. The charges include \$600 for "legal services" billed at \$300 an hour for taking possession of the Trailer that was to provide payment of the then \$9,999.00 flat fee for filing one joint bankruptcy case.

One of the significant services is stated to be being able find "a way around a \$1,000,000 abstract of judgment . . . that preserved [Debtor's] right to a \$100,000 homestead exemption and avoid the judgment being a lien on real property." Points and Authorities, p. 4:13.5-15.5; Dckt. 371. Under California Enforcement of Judgment Law, an abstract of judgment will create a judgment lien on interest of a judgment debtor in real property. If the interest is in real property that is the judgment debtor's residence, then the judgment debtor can claim a homestead exemption in that interest. Cal. C.C.P. §§ 704.410, 704.720, 697.310, 695.010.

Thus, if the Debtor had an interest in the real property the judgment lien would attach. But if that real property was Debtor's residence, then the homestead exemption amount would come ahead of the judgment creditor. It is not clear how and what was the "find a way around" legal services.

### **Troubled Relationship Between Debtor and All Attorneys**

It is very unfortunate that Debtor and Debtor's family has now for years found every attorney they have hired, every attorney that has opposed them, county employees, and state court judges to be allied against them to steal their assets. The court has addressed this history and belief of Debtor several times in this case. Dckts. 306, 307, 308, 314, 333. The court's observation is that this belief/conviction has led Debtor down many expensive paths that have caused them to spend or have judgments ordered against them that have or will consume what would have been substantial assets in their pocket.

This historic conduct by Debtor is even more curious in that Debtor reports having several family members who are attorneys. It would seem that these family members could refer Debtor to attorneys they know, or are known by other attorney's the family members trust, who Debtor would not conclude are in league against Debtor.

In reviewing the Declarations and other documents filed by the Fraley Parties, it also clear that they began realizing that, in their opinion, these two debtors had unreasonable and had unrealistic expectations of the bankruptcy process. Mr. Fraley's Declarations document incomplete or inaccurate information concerning assets and income. As the client "rabbit hole" got deeper and deeper, it appears that the Fraley Parties willingly descended deeper and deeper.

Even the most experienced attorney can initially meet with potential clients, begin work, and then discover that the relationship should not or cannot continue. It may be that the client has beliefs of their rights and the wrongs done to them that do not match up with what are rights and wrongs under the law. The possible client may believe that actions the client takes is warranted because of wrongs done to the client and client's family. However, the attorney may conclude that such "justice" in the eyes of the

client is not permitted under the law.

Such attorneys and clients part ways, hopefully sooner rather than later. Merely because the attorney in good faith initially thought that representation was appropriate does not mean that the attorney gets paid the fees for all of the services to be provided when such services are not provided. Correspondingly, when a client becomes dissatisfied that the attorney will not do what the client demands, it does not invalidate the attorney's right to be paid reasonable fees for reasonable services provided.

It appears that there are several potential "holes" in the Fraley Parties reasonable attorney's fee determination. First, \$9,999 for filing one Chapter 7 voluntary bankruptcy case is well outside the norm. Filing \$19,998 for two related Chapter 7 voluntary bankruptcy cases for these two debtors appears to be well outside the universe of reasonable attorney's fees.

With respect to the \$10,475 in legal fees provided for in the Settlement Agreement, the court notes the following.

First, on Exhibit 12 (Dckt. 367) the Fraley Parties provide a billing statement and computation of amounts due ("Billing Statement"). First for legal services provided by Gary Fraley, Esq., Nedra Fraley, Esq., and BEG, a paralegal, the bill for legal services total \$10,555. Then there is \$400 for storing the trailer and \$860.50 for transferring title to the Trailer that the Fraley Parties chose to accept as payment.

With respect to attorney Nedra Fraley, at the time of the billing statement it is stated that she is "Disabled/Retired." Notwithstanding being retired there is \$700 in billings attributed to her. Of this, \$600 is for her meeting with Shon Treanor to take possession of the Trailer that the Fraley Parties chose to accept for payment of the fees. See 4/02/2020 entry on Billing Statement. It is unclear what \$600 in legal services were provided in accepting the payment that the Fraley Parties chose.

Additionally, while listed as \$600 on the 4/02/2020 entry, on page two of the Billing Statement it is stated to be \$700.00 for "Legal Services" in accepting the tender of payment. It does not appear this \$700 is reasonable nor an obligation that would be permitted under 11 U.S.C. § 329.

For Gary Fraley, the total amounts owing on page 2 of the Billing Statement are stated to be \$7,875. This matches up to the billing entries on the Billing Statement for the period March 18 through April 6, 2021.

In reviewing the billing entries, the one for March 31, 2020, it states that the judgment lien did not attach because the judgment was against Shon Treanor and he did not own the real property, but the Aunt's Trust owned the property. A fairly straight forward proposition. It then states that Debtor would claim a homestead exemption in their beneficial interest as beneficiaries of the Trust. The entry concludes with "Can't find case on point." Possibly that is because there is no case stating that a homestead exemption cannot be claimed by a beneficiary to a trust before the corpus of the trust (the home) is distributed to the beneficiary. However, the court notes the developing case law that a beneficiary of a trust is to be distributed property of the trust in kind, then the beneficiary has an equity interest in that property if that property is to be distributed in kind to that beneficiary. See *Wikin Summary of California Law*, 11<sup>th</sup> Ed; Trusts, § 161; citing *Title Ins. & Trust Co. v. Duffill* (1923) 191 C. 629, 646; and *Hoffman v. Connell* (1999) 73 C.A.4th 1194, 1199. (The court intentionally uses the non-

federal correct state citation method in as that is what is used in the Witkin treatise. *See also, Steinhart v. County of Los Angeles*, 47 Cal. 4<sup>th</sup> 1298 (2010). <sup>FN.1.</sup>

-----  
FN. 1. Alternative, these cases may have cause Mr. Fraley to conclude that the Debtor's equitable interest in the real property caused the judgment lien to attach, just as it would allow Mr. Fraley to conclude that Debtor had an interest in property in which the homestead exemption could be claimed.  
-----

The billings also include significant time spent by both Mr. Fraley and the paralegal in attempting to find ways to circumvent the means test.

In considering what is reasonable, the court also considers Debtor and how Debtor has demonstrated an adamant advancement, argument (well detailed), and assertion of the law and facts which conclude with Debtor having been cheated by the league of attorneys, county employee, and at least one state court judge who are allied against them. In doing the work to prepare for filing before being terminated by Debtor and the Fraley Parties concluding that they should not proceed with representation, it is clear that Debtor would make preparation more challenging. Additionally, while Mr. Fraley concludes that this was a case of unique and substantial legal issues, it was not.

With respect to the \$8,875.00 in legal fee billings by Gary Fraley and Nedra Fraley, they should first be reduced for the \$700.00 for "legal services" provided by Nedra Fraley for sitting around waiting for Shon Treanor to accept receipt of the Trailer.

Next, it appears that if this matter were presented to the court, whether *sua sponte* or on motion, under 11 U.S.C. § 329, they should also be reduced. Five hours is billed by the paralegal relating to the means test "work around," preparing a separate petition for Jill Treanor, and getting information entered into Best Case (bankruptcy software). But then the paralegal spent 7 hours "completing preparation" of the Jill Treanor petitions, and then working "all day" to "change" the two petitions so they would "pass the means test." It appears there was excessive "creative planning" time expended attempting to circumvent the Bankruptcy Code and not in doing the reasonable and necessary work. The court would likely cut five hours of the paralegal billings, which reduction would total 5 x \$120 an hour, which equals a \$600 reduction. <sup>FN.2.</sup>

-----  
FN. 2. The court also notes that the time and charges by the paralegal do not "math out." For the April 3, 2020 five hours billed, the dollar amount is stated to be \$720. That equals \$144 an hour. However, it is stated that the paralegal is to bill at \$120 an hour.  
-----

With respect to the Gary Fraley billings, while the court might question some portion of the four hours billed on March 31, 2020 relating to the conclusion that property of the Trust was not property of the Debtor, but only the Debtor's beneficial interest would be property of the bankruptcy estate as not being something of significant legal ability, such may be warranted in light of the unique client the Debtor presents.

Thus, the \$8,875.00 in legal services billing would be reduced by (\$700), the Nedra Fraley waiting to accept the Trailer time, and (\$600) for the paralegal working to circumvent the Bankruptcy

Code. This would result in there being \$7,575.00 in legal fees allowable under 11 U.S.C. § 329.

With respect to storage fees and expenses for “protecting” the trailer since April 2020, the court notes that the Fraley Parties could, as they represented they would, have turned the Trailer over to the Trustee in June 2020, the Trustee could have then promptly moved to sell the Trailer in a commercially reasonable manner (and not a forced, or possibly even an orderly, LIQUIDATION sale), and all of those costs would have been avoided. Rather, the Fraley Parties retained possession of the Trailer for their own benefit, even attempting to sell it and retain the proceeds rather than turn it over to the Trustee. The evidence presented, including Mr. Fraley’s Declarations, demonstrate that the Fraley Parties retained possession of the Trailer for their own economic advantage and to keep it away from the Trustee. Having so acted, they cannot now seek to have the Trustee and Bankruptcy Estate fund that conduct of the Fraley Parties.

Finally, there are additional DMV fees and “service fees to LA Mesa RV in the amount of \$860.50. The amount of the DMV fees to put title in the Fraley Parties is not stated. Such might not be an unreasonable amount for the Fraley Parties to recover. However, it is not clear what “service fees” LA Mesa RV are and what services were provided the Fraley Parties.

Thus, it would appear that there would be around \$8,000 in legal fees recoverable as provided under 11 U.S.C. § 329. This is just a ballpark number and the court is not making such a determination at this time.

However, if the Parties as part of the reconstructed settlement based on the \$29,000 value given by the Appraiser used this amount, there may be a settlement to be approved. Using the \$29,000 amounts, which the court presumes would be the actual selling price even with a buyer’s premium, then a value for the Estate would look like:

|            |   |
|------------|---|
| \$29,000   | Sales Price                             |
| (\$ 4,350) | 15% Auction Commission                  |
| (\$ 1,000) | Recoverable Costs of Sale by Auctioneer |
| (\$ 8,000) | Fraley Parties’ § 329 Legal Fees        |
| =====      |   |
| \$15,650   | Value of Estate’s Interest              |

With such numbers, the Fraley Parties may want to increase their settlement payment to the Estate. Or, they may want to let the Trustee proceed with a sale, and the Trustee have the risk of making more or less when the actual sale occurs.

At the hearing, **XXXXXXX**

### **Consideration of Additional Offers**

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to Movant to purchase or prosecute the property, claims, or interests of the estate present such offers in open court. At the hearing -----.

### **October 28, 2021 Hearing**

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is **not** in the best interest of the creditors and the Estate because **XXXXXXX**. The Motion is **XXXXXXX**.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Approve Compromise filed by Hank M. Spacone, the Chapter 7 Trustee, (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion for Approval of Compromise between Movant and Fraley & Fraley, PC and Gary Fraley (“Settlor”) is **XXXXXXX**

# FINAL RULINGS

12. [21-23017-E-7](#) **HEATHER SIMMONS** **MOTION FOR RELIEF FROM**  
[JHW-1](#) **Mohammad Mokarram** **AUTOMATIC STAY**  
**9-28-21 [11]**  
**SANTANDER CONSUMER USA INC.**  
**VS.**

**Final Ruling:** No appearance at the October 28, 2021 hearing is required.

-----

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 7 Trustee, and Office of the United States Trustee on September 28, 2021. By the court’s calculation, 30 days’ notice was provided. 28 days’ notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

**The Motion for Relief from the Automatic Stay is granted.**

SANTANDER CONSUMER USA INC. (“Movant”) seeks relief from the automatic stay with respect to an asset identified as a 2019 NISSAN SENTRA, VIN ending in 4413 (“Vehicle”). The moving party has provided the Declaration of ASHLEY YOUNG to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by HEATHER LEE SIMMONS (“Debtor”).

Movant argues Debtor has not made 1 post-petition payment, with a total of \$542.66 in post-petition payments past due. Information Sheet, Dckt. 16. Movant also provides evidence that there are 6.63 pre-petition payments in default, with a pre-petition arrearage of \$3,598.62. *Id.*

On June 2, 2021, the Vehicle was impounded. Movant recovered the Vehicle on July 15, 2021 and it is being held pending relief from stay. Declaration, Dckt. 14.

### **NADA Valuation Report Provided**

Movant has also provided a copy of the NADA Valuation Report for the Vehicle. The Report has been properly authenticated and is accepted as a market report or commercial publication generally relied on by the public or by persons in the automobile sale business. FED. R. EVID. 803(17).

### **DISCUSSION**

Debtor has not listed the Vehicle on their Statement of Intention or in their schedules. However, from the evidence provided to the court by Movant, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$23,310.46 (Declaration, Dckt. 14), while the value of the Vehicle is determined to be \$18,450.00, as stated on the NADA Valuation Report.

#### **11 U.S.C. § 362(d)(1): Grant Relief for Cause**

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because “cause” is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff’d sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

#### **11 U.S.C. § 362(d)(2)**

A debtor has no equity in property when the liens against the property exceed the property’s value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. 11 U.S.C. § 362(g)(2); *United Sav. Ass’n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988). Based upon the evidence submitted, the court determines that there is no equity in the Vehicle for either Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the Vehicle is *per se* not necessary for an effective reorganization. *See Ramco Indus. v. Preuss (In re Preuss)*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the



Vehicle, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

### **Request for Waiver of Fourteen-Day Stay of Enforcement**

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is granted.

No other or additional relief is granted by the court.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief from the Automatic Stay filed by SANTANDER CONSUMER USA INC. (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as a 2019 NISSAN SENTRA, VIN ending in 4413 (“Vehicle”), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.

**IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) waived for cause.

No other or additional relief is granted.

**Final Ruling:** No appearance at the October 28, 2021 hearing is required.

-----

The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 13 Trustee as stated on the Certificate of Service on September 26, 2021. The court computes that 32 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: \$26.00 due on September 14, 2021.

**The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.**

The court's docket reflects that the default in payment that is the subject of the Order to Show Cause has been cured.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Order to Show Cause is discharged, no sanctions ordered, and the bankruptcy case shall proceed in this court.

**Final Ruling:** No appearance at the October 28, 2021 hearing is required.

-----

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor’s Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on September 21, 2021. By the court’s calculation, 37 days’ notice was provided. 28 days’ notice is required.

The Motion to Employ and Motion to Sell has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

|  |
|--|
| <p><b>The Motion to Sell Property and Employ is granted.</b></p> |
|--|

#### **SALE OF PROPERTY**

The Bankruptcy Code permits J. Michael Hopper, the Chapter 7 Trustee to complete the sale by public auction of (1) the 2017 Aluma Trailer Dual Axle 8220B (“Trailer”) and (2) 2005 Yamaha Snowmobile Vector LTXC GT (“Snowmobile”), pursuant to 11 U.S.C. §§ 363(b)(1).

Trustee asserts the proposed auction through WEST AUCTION, INC. (“West Auctions”) will provide a greater net return to the estate than attempting to sell such items through a private sale. Dckt. 31. Trustee further asserts the auction of both the Trailer and Snowmobile “as-is” will allow for a quick and efficient sale and will maximize the net return to the estate. *Id.*

#### **Discussion**

Based on the evidence before the court, the court determines that the proposed auction is in

the best interest of the Estate because it will maximize the net return to the estate for the Trailer and Snowmobile.

### **Request for Waiver of Fourteen-Day Stay of Enforcement**

Federal Rule of Bankruptcy Procedure 6004(h) stays an order granting a motion to sell for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court because the Trustee does not anticipate any opposition to this motion. Further, so the auction can move forward immediately upon entry of Bankruptcy Court order approving the sale.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 6004(h), and this part of the requested relief is granted.

### **EMPLOYMENT OF WEST AUCTIONS, INC.**

J. Michael Hopper (“Trustee”) seeks to employ West Auctions, Inc. (“Auctioneer”) pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of Auctioneer to 2017 Aluma Trailer Dual Axle 8220B and a 2005 Yamaha Snowmobile Vector LTX GT.

Trustee argues that Auctioneer’s appointment and retention is necessary to facilitate a liquidation of the Trailer and Snowmobile and produce the highest and best return to the bankruptcy estate. West Auctions will receive fifteen percent (15%) of the gross sale proceeds, plus reimbursement for expenses in an amount not to exceed \$1,050.00, estate shall be paid all net proceeds of the sale within thirty days, all gross proceeds of the sale shall be maintained separate from West Auctions’ personal or general funds and accounts, at the conclusion of sale West Auctions will provide the United States Trustee, the Trustee and the Court an itemized statement of the assets sold, and the fourteen day stay period be waived.

Donna Bradshaw, a Vice President of West Auctions, Inc., testifies that she will advertise the Trailer and Snowmobile on its website. Donna Bradshaw testifies she and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

### **Discussion**

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee’s duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being

anticipated at the time of fixing of such terms and conditions.

Taking into account all of the relevant factors in connection with the employment and compensation of Auctioneer, considering the declaration demonstrating that Auctioneer does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Donna Bradshaw as Auctioneer for the Chapter 7 Estate on the terms and conditions set forth in the Motion.

Approval of the contingency fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

Though not requested in the Motion, the court makes applicable the provisions of Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure 7018 which allow for joining of multiple claims for relief – here the authorization to sell property, the authorization to employ auctioneer, and authorization to pay Auctioneer the 15% commission from the sales proceeds – as authorized in Federal Rule of Bankruptcy Procedure 9014(c). Pending adoption of a Local Rule permitting such joinder of claims for relief in one motion or application, persons believing such relief is proper should either file a motion requesting the court make the provisions of Rules 18 and 7018 applicable, or more simply, include that as additional relief requested at the start of the motion or application.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Sale Property and Employ filed by J. Michael Hopper (“Trustee”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Sell Property is granted, and Trustee is authorized to sell 2017 Aluma Trailer Dual Axle 8220B and a 2005 Yamaha Snowmobile Vector LTX GT on the terms and conditions as set forth in the Motion.

- A. The Property shall be sold by West Auctions, Inc., on the terms and conditions set forth in the Motion and as further provided in this Order.
- B. The Chapter 7 Trustee is authorized to execute any and all documents reasonably necessary to effectuate the sale.

**IT IS FURTHER ORDERED** that the Motion to Employ is granted, and Trustee is authorized to employ Donna Bradshaw as Auctioneer for Trustee on the terms and conditions as set forth in the Motion.

**IT IS FURTHER ORDERED** that compensation is permitted

Applicant in the amount of fifteen percent (15%) of the gross sale proceeds, plus reimbursement for expenses in an amount not to exceed \$1,050.00, to auctioneer which is allowed pursuant to 11 U.S.C. § 330, subject to the provisions of 11 U.S.C. § 328.

**IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

**IT IS FURTHER ORDERED** that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

**IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 6004(h) is waived for cause for both the Motion to Sell and the Motion to Employ.

**Final Ruling:** No appearance at the October 28, 2021 hearing is required.

-----

Local Rule 9014-1(f)(2) Motion—Continue Hearing.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on September 2, 2021. By the court’s calculation, 21 days’ notice was provided. 21 days’ notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days’ notice when requested fees exceed \$1,000.00).

The Motion for Allowance of Professional Fees was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. No opposition was presented at the hearing.

|  |
|--|
| <p><b>The Motion for Allowance of Additional Professional Fees is granted.</b></p> |
|--|

DESMOND, NOLAN, LIVAICH & CUNNINGHAM, the Attorney (“Applicant”) for Alan S. Fukushima, the Chapter 7 Trustee (“Client”), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period September 12, 2019, through August 30, 2021. The order of the court approving employment of Applicant was entered on September 17, 2019. Dckt. 26. Applicant requests fees in the amount of \$19,040.00 and costs in the amount of \$568.64.

At the hearing Applicant reported that there has been identified one final objection to claim that must be filed. It is for a proof of claim filed for an equity interest in the Debtor, which is not allowable as a claim.

## **APPLICABLE LAW**

### **Reasonable Fees**

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

*In re Garcia*, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

### **September 24, 2021 Order Granting Motion/Application for Compensation**

On September 24, 2021 the Court ordered that Desmond, Nolan, Livaich & Cunningham is allowed Fees in the amount of \$19,040.00 and Expenses in the amount of \$568.64. It is Further Ordered that the Chapter 7 Trustee is authorized to pay 100% of the fees and 100% of the costs allowed by this Order from the available funds of the Estate.

### **October 5, 2021 Supplemental Declaration In Support of Motion/Application for Compensation**

On October 5, 2021 J. Russell Cunningham, Attorney for the Chapter 7 Trustee Alan Fukushima, filed a Supplemental Declaration In Support of the Motion/Application for Compensation filed by J. Russell Cunningham, Dckt. 141.

Mr. Cunningham seeks additional compensation in the amount of \$2,517.50 in fees and \$0.00 expenses for the period of September 1, 2021 to September 29, 2021. This additional compensation is for attending the Court Hearing on September 23, 2021, where the court ruled on an interim basis for the Motion/Application for Compensation in the amount of \$19,040.00 fees and \$568.64 expenses for the period of September 12, 2019 to August 30, 2021. Additionally, the hearing consisted of continuing the matter for final hearing on October 28, 2021 to afford the Trustee an opportunity to object to Proof of Claim 15-1, filed by Mark Marvelli, Dckt. 134. On September 28, 2021 Trustee filed an objection to Marvelli's claim and on September 29, 2021 Marvelli agreed to withdraw the claim.

### **October 28, 2021 Hearing**



The court grants the request for additional fees. The court has determined that oral argument will not be of assistance in rendering a decision in this matter.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Allowance of Additoinal Fees and Expenses filed by Russell J. Cunningham, Esq., of Desmond, Nolan, Livaich & Cunningham (“Applicant”), Attorney for the Chapter 7 Trustee, (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that by Russell J. Cunningham, Esq., of desmond, Nolan, Livaich & Cunningham is allowed the following Additional fees and expenses as a professional of the Estate:

Russell J. Cunningham, Esq., of Desmond, Nolan, Livaich & Cunningham, Professional employed by Chapter 7 Trustee

Fees in the amount of \$2,517.50  
Expenses in the amount of \$0.00,

as Additional Final Fees pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

**IT IS FURTHER ORDERED** that the Chapter 7 Trustee is authorized to pay the additional fees allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

**Final Ruling:** No appearance at the October 28, 2021 hearing is required.

-----

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 14, 2021. By the court's calculation, 44 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Allowance of Professional Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion for Allowance of Professional Fees is granted.**

McManimon, Scotland & Baumann, LLC, the Attorney("Applicant") for Geoffrey Richards, the Chapter 7 ("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period August 8, 2019, through November 30, 2019. The order of the court approving employment of Applicant was entered on October 1, 2019. Dckt. 226. Applicant requests fees in the amount of \$1,725.00 and costs in the amount of \$55.64.

## APPLICABLE LAW

### Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the

circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

- A. Were the services authorized?
- B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?
- C. Are the services documented adequately?
- D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?
- E. Did the attorney exercise reasonable billing judgment?

*In re Garcia*, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

### **Lodestar Analysis**

For bankruptcy cases in the Ninth Circuit, “the primary method” to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves “multiplying the number of hours reasonably expended by a reasonable hourly rate.” *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate, however. *See id.* (citing *Unsecured Creditors’ Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

### **Reasonable Billing Judgment**

Even if the court finds that the services billed by an attorney are “actual,” meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court’s authorization to employ an attorney to work in a bankruptcy case does not give that attorney “free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery,” as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat’l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) (“Billing judgment is mandatory.”). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

- (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable

recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

*In re Puget Sound Plywood*, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include conducting records searches relating to property administered through Probate proceedings, reviewed the docket and pleading of the Probate Proceeding, prepared and filed caveat challenging surrogate instructions, and apprised the Trustee of developments in the Probate Proceeding. The Estate has \$24,000.00 of unencumbered monies to be administered as of the filing of the application. The court finds the services were beneficial to Client and the Estate and were reasonable.

## **FEES AND COSTS & EXPENSES REQUESTED**

### **Fees**

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

Conducted Record Searches Relating to Property Administered through the Probate Proceeding: Applicant spent 1.0 hours in this category. Applicant emailed regarding property search, communicated with title company, reviewed and analyzed title report, and reviewed updated property search.

Reviewed Docket and Pleadings of Probate Proceeding: Applicant spent 1.3 hours in this category. Applicant reviewed docket, drafted emailed regarding status and revised draft retainer agreement.

Prepared and Filed Caveat Challenging Surrogate Instructions: Applicant spent 1.5 hours in this category. Applicant drafted and filed Caveat.

Apprised Trustee of Developments in Probate Proceeding: Applicant spent 1.1 hours in this category. Applicant communicated and drafted an email to the Trustee regarding the assets.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

| <b>Names of Professionals and Experience</b> | <b>Time</b> | <b>Hourly Rate</b> | <b>Total Fees Computed Based on Time and Hourly Rate</b> |
|--|-------------|--------------------|--|
| SBP, Attorney                                | 2.1         | \$295.00           | \$619.50   |

|   |     |          |               |
|---|-----|----------|---------------|
| MBM, Attorney                               | 0.2 | \$215.00 | \$43.00       |
| AS1, Attorney                               | 1.5 | \$575.00 | \$862.50      |
| DP, Attorney                                | 0.3 | \$200.00 | \$60.00       |
| BBC, Attorney                               | 0.8 | \$175.00 | \$140.00      |
|   | 0   | \$0.00   | <u>\$0.00</u> |
| <b>Total Fees for Period of Application</b> |     |          | \$1,725.00    |

### **Costs & Expenses**

Applicant also seeks the allowance and recovery of costs and expenses in the amount of \$55.64 pursuant to this application.

The costs requested in this Application are,

| <b>Description of Cost</b>                  | <b>Per Item Cost, If Applicable</b> | <b>Cost</b> |
|---|-------------------------------------|-------------|
| Inside Duplicating                          | \$                                  | \$1.40      |
| Filing Fee                                  |                                     | \$25.00     |
| Postage                                     |                                     | \$29.24     |
|   |                                     | \$0.00      |
| <b>Total Costs Requested in Application</b> |                                     | \$55.64     |

### **FEES AND COSTS & EXPENSES ALLOWED**

#### **Fees**

#### **Hourly Fees**

The court finds that the hourly rates are reasonable and that Applicant effectively used appropriate rates for the services provided. First and Final Fees in the amount of \$1,725.00 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

#### **Costs & Expenses**

First and Final Costs in the amount of \$55.64 are approved pursuant to 11 U.S.C. § 330 and authorized to be paid by the Chapter 7 Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

The court authorizes the Chapter 7 Trustee to pay 100% of the fees and 100% of the costs allowed by the court.

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

|                    |            |
|--------------------|------------|
| Fees               | \$1,725.00 |
| Costs and Expenses | \$55.64    |

pursuant to this Application as final fees and costs pursuant to 11 U.S.C. § 330 in this case.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Allowance of Fees and Expenses filed by McManimon, Scotland & Baumann, LLC (“Applicant”), Attorney for Geoffrey Richards, the Chapter 7 Trustee, (“Client”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that McManimon, Scotland & Baumann, LLC is allowed the following fees and expenses as a professional of the Estate:

McManimon, Scotland & Baumann, LLC, Professional employed by the Chapter 7 Trustee

Fees in the amount of \$1,725.00  
Expenses in the amount of \$55.64,

as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

**IT IS FURTHER ORDERED** that the Chapter 7 Trustee is authorized to pay 100% of the fees and 100% of the costs allowed by this Order from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

**Final Ruling:** No appearance at the October 28, 2021 hearing is required.

-----

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 13, 2021. By the court’s calculation, 45 days’ notice was provided. 28 days’ notice is required.

The Motion for Allowance of Administrative Expenses has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

|   |
|---|
| <p><b>The Motion for Allowance of Administrative Expenses is granted.</b></p> |
|---|

The Chapter 7 Trustee, J. Michael Hopper (“Movant”), requests payment of administrative expenses in the amount of \$1,500.00 for providing Chapter 7 administration expense claim resulting from payroll taxes that will become due and payable upon payment of the Wage Claim to Conquip, Inc. (“Debtor”).

## DISCUSSION

Movant argues that 11 U.S.C. § 503(b)(1)(D) does not require the filing of a request for payment as a condition for the Payroll Tax Claim being allowed as an administrative expense claim. Further, the Trustee has consulted with the CPA regarding employer payroll taxes owed on the Wage Claim, which the CPA has advised will total \$1,039.04. The Trustee is seeking allowance of the Payroll Tax Claim in an amount not to exceed \$1,500.00 out of an abundance of caution.

Section 503(b)(1)(A) of the Bankruptcy Code accords administrative expense status to “the actual, necessary costs and expenses of preserving the estate . . . .” Here, Movant, the Trustee, or his Professionals working on behalf of advancement of the bankruptcy estate would qualify under the Bankruptcy Code. The Professionals in question are determining the amount of payroll taxes that will be owed to the Wage Claim.

Movant having demonstrated that the expenses were necessary, the court finds that Movant providing Chapter 7 administration expense claim resulting from payroll taxes that will become due and payable upon payment of the Wage Claim for Debtor was necessary for Debtor and provided benefit to the Estate. The Motion is granted, and the Chapter 7 Trustee is authorized to pay Movant its administrative expenses in the amount of \$1,500.00.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Allowance of Administrative Expense filed by J. Michael Hopper (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted, and the Chapter 7 Trustee is authorized to pay J. Michael Hopper \$1,500.00 as an administrative expense of the Chapter 7 Estate in this case pursuant to 11 U.S.C. § 503(b)(1).



**Final Ruling:** No appearance at the October 28, 2021 hearing is required.

-----

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 17, 2021. By the court’s calculation, 41 days’ notice was provided. 28 days’ notice is required.

The Motion to Employ has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

**The Motion to Employ is granted.**

J. Michael Hopper (“Trustee”) seeks to employ Noemi Landrau (“Counsel”) pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Trustee seeks the employment of Counsel to perform legal and notarial services required to complete the Trustee’s sale of the Subject Property.

Trustee argues that Counsel’s appointment and retention is necessary to sell the Subject Property and cannot be completed without said services. The terms of Landrau’s employment consist of a flat fee agreement of \$2,250.00 for legal services and \$4,062.50 for notarial services for a total of \$6,312.50.

Noemi Landrau, a partner of Landrau, Rivera & Associates, testifies that she will assist with notarial services in Puerto Rico in order to complete the sale of real property and obtain the inscription of the transaction at the Property Registry of the Department of Justice of Puerto Rico. Noemi Landrau testifies she and the firm do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to

engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Taking into account all of the relevant factors in connection with the employment and compensation of Counsel, considering the declaration demonstrating that Counsel does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Noemi Landrau as Counsel for the Chapter 7 Estate on the terms and conditions set forth in the Notarial Fees and Expenses filed as Exhibit A, Dckt. 180. Approval of the commission is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Employ filed by J. Michael Hopper ("Trustee) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Employ is granted, and Trustee is authorized to employ Noemi Landrau as Counsel for Trustee on the terms and conditions as set forth in the Notarial Fees and Expenses filed as Exhibit A, Dckt. 180.

**IT IS FURTHER ORDERED** that compensation not to exceed \$2,250.00 for legal services and \$4,062.50 for notarial services for a total of \$6,312.50, is allowed pursuant to 11 U.S.C. § 330, and subject to the provisions of 11 U.S.C. § 328.

**IT IS FURTHER ORDERED** that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

**IT IS FURTHER ORDERED** that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.